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Sha'ari bin A Samat v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42S (A)-05–10 OF 2015
COLLIN SEQUERAH JC
5 JANUARY 2017

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Criminal appellate jurisdiction — Whether appellant could revisit issue of whether prima facie case made out by prosecution — Whether defence succeeded in raising reasonable doubt in case for prosecution — Whether sessions court judge ('the SCJ') erred in law and fact in assessment of defence — Whether appellate* D *intervention necessary — Sentence — Whether the SCJ considered all relevant factors*

Evidence — Witness — Unsworn statement from dock — Whether the SCJ E *accorded appropriate weight to unsworn statement*

The appellant who was acting as the relief teacher in a moral class in Sekolah Menengah Kebangsaan Dato' Usman Awang in Kota Tinggi was charged with having sexually violated one of his pupils ('the victim'). It was the prosecution's F case that on 1 July 2013, the appellant had informed the victim to wait for him in the school toilet and that in the said toilet he had firstly inserted his penis in her vagina and then asked the victim to perform oral sex on him. The victim's parents had lodged a police report against the appellant in respect of what the appellant had done to the victim This led to the appellant being charged under G s 354 of the Penal Code ('charge 1') and s 377B of the Penal Code ('charge 2'). At the conclusion of the case for the prosecution, the sessions court ruled that the prosecution had failed to make out a prima facie case against the appellant and thus the appellant was acquitted and discharged. The prosecution appealed to the High Court, which upheld the decision of the sessions court. The H prosecution further appealed to the Court of Appeal, which allowed the appeal. The Court of Appeal ruled that the prosecution had made out a prima facie case against the appellant and ordered the case to be remitted back to the sessions court with an order that the defence of the appellant be called. The sessions court accordingly called for the defence of the appellant. The appellant I elected to make a statement from the dock wherein he denied the allegations made by the victim and claimed that he had not left the class for the duration stated by the victim. Instead the appellant stated that the victim was prone to making up stories and that he was the victim of a frame up. After hearing the defence the sessions court judge found that the defence had failed to raise a

reasonable doubt in the case for the prosecution and convicted him on both charges. The appellant was sentenced to imprisonment for a term of three years in respect of the first charge and a term of seven years in respect of the second charge, with both sentences to run concurrently. This was the appellant's appeal against that conviction and sentence. The appellant submitted, inter alia, that the victim's evidence had not been corroborated by the testimony of her parents as they emanated from the same source and were therefore not independent. The appellant also raised other alleged infirmities in the prosecution case.

Held, dismissing the appeal against conviction and sentence:

(1) The Court of Appeal had ruled, contrary to the decision of the sessions court judge ('the SCJ') to hold that there was a prima facie case against the appellant, when it remitted the case back to the sessions court with an order that the defence of the appellant be called. In that context, the earlier ruling of the SCJ in respect of the fact that there was no independent corroboration of the victim's evidence and also other initial findings by the SCJ at the end of the prosecution case, were irrelevant. It is settled law that the hierarchy or structure of the system of courts in our jurisdiction was essentially premised upon a two-tier right of appeal. The decision of the SCJ that the prosecution had failed to make out a prima facie case for the prosecution was subject to appeal to the High Court, which upheld the decision of the sessions court. The matter thereafter went on further appeal to the Court of Appeal. However, the Court of Appeal to the contrary decided that the prosecution had succeeded in making out a prima facie case and ordered that the defence of the appellant be called. That effectively concluded the two-tier process in respect of the decision in respect of whether a prima facie case had been made out by the prosecution. Hence, the Court of Appeal's finding that a prima facie case had been made out by the prosecution could not be revisted (see paras 35, 42–46 & 55).

(2) In the assessment of the appellant's defence the SCJ had correctly observed that the weight to be accorded to an unsworn statement made from the dock should necessarily be less than that of evidence by way of sworn testimony. The SCJ had also correctly observed that the evidential value of such evidence would be affected by the absence of the opportunity to test the credibility of such evidence by way of cross-examination. She was therefore also correct in observing that the appellant had failed to give credible evidence (see paras 49–50).

(3) The SCJ was cognisant of and well aware of the fact that the appellant's defence was premised upon an alibi (see paras 51–52).

(4) The SCJ had correctly found that the defence of him being impotent was unsupported by any credible evidence sufficient to raise a reasonable doubt in the prosecution case. In any event, even if the appellant was

impotent this did not necessarily mean that he had not committed the offences for which he was charged with. There was sufficient other evidence that the appellant had committed the offences he was charged for. In the circumstances, the SCJ had not erred in fact or in law in coming to her ultimate decision at the end of the whole case (see paras 54 & 56–57).

(5) In respect of sentence, the SCJ had considered all relevant factors such as public interest and the vulnerability of the victim, who was a child with special needs, and that the appellant had abused the trust and confidence reposed in him to care for the victim as custodian and not to take advantage of the situation. Under the circumstances, there was no flaw in the sentences passed by the SCJ (see paras 58–60).

[Bahasa Malaysia summary

Perayu yang merupakan seorang guru ganti dalam kelas pendidikan moral di Sekolah Menengah Kebangsaan Dato' Usman Awang di Kota Tinggi telah dituduh mencabul salah seorang muridnya ('mangsa'). Kes pendakwaan menunjukkan bahawa pada 1 Julai 2013, perayu telah memaklumkan kepada mangsa untuk menunggunya dalam tandas sekolah dan dalam tandas tersebut perayu telah memasukkan zakarnya ke dalam kemaluan mangsa dan kemudian meminta mangsa untuk melakukan seks oral ke atasnya. Ibu bapa mangsa telah membuat laporan polis terhadap perayu berkenaan dengan apa yang perayu telah lakukan ke atas mangsa. Hal ini telah membawa kepada perayu dituduh di bawah s 354 Kanun Keseksaan ('pertuduhan 1') dan s 377B Kanun Keseksaan ('pertuduhan 2'). Di akhir kes pendakwaan, mahkamah sesyen telah memutuskan bahawa pihak pendakwaan telah gagal membuktikan suatu kes prima facie terhadap perayu maka perayu dilepaskan dan dibebaskan. Pihak pendakwaan telah merayu ke Mahkamah Tinggi, yang telah mengekalkan keputusan mahkamah sesyen. Pihak pendakwaan seterusnya merayu ke Mahkamah Rayuan, yang membenarkan rayuan oleh pendakwaan. Mahkamah Rayuan memutuskan bahawa pihak pendakwaan telah berjaya membuktikan suatu kes prima facie terhadap perayu dan memerintahkan supaya kes ini dikembalikan ke mahkamah sesyen dengan perintah supaya perayu dipanggil membela diri. Mahkamah sesyen telah memanggil perayu untuk membela diri. Perayu memilih untuk memberi keterangan dari kandang tertuduh yang perayu telah menafikan tuduhan yang dibuat oleh mangsa dan menyatakan bahawa dia tidak pernah meninggalkan kelas sepanjang tempoh yang dinyatakan oleh mangsa. Sebaliknya perayu menyatakan bahawa mangsa memang gemar mereka-reka cerita dan perayu merupakan mangsa fitnah. Setelah mendengar pembelaan perayu, hakim mahkamah sesyen mendapati bahawa pihak pembelaan telah gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan mensabitkannya atas kedua-dua pertuduhan. Perayu telah dijatuhkan hukuman penjara selama tempoh tiga tahun bagi kesalahan pertama dan penjara selama tempoh tujuh tahun bagi pertuduhan

kedua, yang kedua-dua hukuman berjalan serentak. Rayuan ini merupakan rayuan perayu terhadap sabitan dan hukuman. Perayu menghujahkan, antaranya, bahawa keterangan mangsa tidak disokong dengan testimoni kedua-dua ibu bapanya kerana testimoni itu muncul daripada sumber yang sama dan oleh itu tidak bebas. Perayu juga membangkitkan beberapa kelemahan lain dalam kes pendakwaan.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

(1) Mahkamah Rayuan telah memutuskan, berbeza dengan keputusan hakim mahkamah sesyen ('HMS') yang memutuskan bahawa terdapat kes prima facie terhadap perayu, apabila Mahkamah Rayuan mengembalikan semula kes ke mahkamah sesyen dengan perintah supaya perayu dipanggil untuk membela diri. Dalam konteks itu, keputusan terdahulu HMS berkenaan dengan fakta bahawa tidak terdapat keterangan sokongan yang bebas ke atas keterangan mangsa dan dapatan awal lain oleh HMS di akhir kes pendakwaan, adalah tidak relevan. Ia adalah suatu undang-undang yang mantap bahawa hirarki atau struktur sistem mahkamah dalam bidang kuasa kita pada dasarnya terletak kepada dua tingkatan hak untuk merayu. Keputusan oleh HMS bahawa pihak pendakwaan telah gagal untuk membuktikan suatu kes prima facie adalah tertakluk kepada rayuan ke Mahkamah Tinggi, yang mengekalkan keputusan mahkamah sesyen. Hal ini selanjutnya dirayu ke Mahkamah Rayuan. Walau bagaimanapun, Mahkamah Rayuan sebaliknya telah memutuskan bahawa pihak pendakwaan telah berjaya membuktikan suatu kes prima facie dan memerintahkan supaya pihak perayu dipanggil untuk membela diri. Hal itu telah secara efektifnya menamatkan proses dua tingkatan berkenaan dengan keputusan sama ada suatu kes prima facie telah berjaya dibuktikan oleh pihak pendakwaan. Oleh itu, dapatan Mahkamah Rayuan bahawa suatu kes prima facie telah dibuktikan oleh pihak pendakwaan tidak boleh disemak semula (lihat perenggan 35, 42–46 & 55).

(2) Dalam menilai pembelaan perayu, HMS telah dengan tepat memutuskan bahawa berat yang perlu diberikan kepada suatu keterangan tidak bersumpah yang dibuat daripada kandang tertuduh haruslah lebih rendah daripada keterangan yang diberikan secara bersumpah. HMS telah dengan tepat memutuskan bahawa nilai keterangan bagi keterangan sebegitu tentulah terjejas dengan ketiadaan peluang untuk menguji kredibiliti keterangan tersebut melalui pemeriksaan balas. Beliau juga telah memutuskan dengan tepat bahawa pihak perayu telah gagal memberikan keterangan boleh percaya (lihat perenggan 49–50).

(3) HMS menyedari dan mengetahui tentang fakta bahawa rayuan perayu adalah bersandarkan kepada suatu alibi (lihat perenggan 51–52).

(4) HMS telah memutuskan dengan tepat bahawa pembelaan perayu bahawa beliau merupakan seorang yang impoten tidak disokong oleh apa-apa keterangan boleh percaya yang mencukupi untuk menimbulkan suatu keraguan yang munasabah terhadap kes pendakwaan. Dalam apa-apa keadaan pun, jika benar perayu merupakan seorang yang mati pucuk, hal ini tidak bermakna bahawa dia tidak melakukan kesalahan yang telah dipertuduhkan ke atasnya. Terdapat keterangan lain yang mencukupi bahawa perayu telah melakukan kesalahan yang dipertuduhkan ke atasnya. Dalam hal sedemikian, HMS tidak terkhilaf dari segi fakta ataupun undang-undang apabila membuat keputusan di akhir keseluruhan kes (lihat perenggan 54 & 56–57).

(5) Berkenaan dengan hukuman, HMS telah menimbangkan semua faktor yang relevan seperti kepentingan awam dan kerapuhan mangsa, yang merupakan seorang kanak-kanak istimewa, dan bahawa perayu telah mengkhianati amanah dan kepercayaan yang diberikan kepadanya untuk menjaga mangsa sebagai penjaga dan tidak mengambil kesempatan atas situasi itu. Dalam keadaan sedemikian, tidak terdapat kecacatan dalam hukuman yang dijatuhkan oleh HMS (lihat perenggan 58–60).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

For cases on witness in general, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3370–3710.

Cases referred to

Masroni bin Ahmad Rafi v PP [1996] MLJU 584; [1996] 1 LNS 341, HC (refd)

P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (folld)

Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)

PP v Tan Gong Wai & Anor [1985] 1 MLJ 355 (refd)

Legislation referred to

Courts of Judicature Act 1964

Criminal Procedure Code s 316

Penal Code ss 354, 377B

Noordin bin Hussin (Tia & Noordin) for the appellant.

Nur Iffa Zarilla bt Abd Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] The appellant was charged at the Kota Tinggi Sessions Court for the following charges:

First charge:

> Bahawa kamu pada 1.7.2013 diantara jam lebih kurang 10.00 pagi hingga 11.00 pagi di dalam sebuah tandas, di Sekolah Menengah Kebangsaan Dato' Usman Awang di dalam daerah Kota Tinggi di dalam Negeri Johor Takzim, didapati telah melakukan kekerasan jenayah kepada seorang perempuan bernama Nur Izzah Hazirah KPT: 990110-01-6800 dengan niat untuk mencabul kehormatannya dan oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 354 Kanun Keseksaan.

Second charge:

> Bahawa kamu pada 1.7.2013 diantara jam lebih kurang 10.00 pagi hingga 11.00 pagi di dalam sebuah tandas, di Sekolah Menengah Kebangsaan Dato' Usman Awang di dalam daerah Kota Tinggi di dalam Negeri Johor Takzim, dengan sengaja telah melakukan persetubuhan yang bertentangan dengan luar tabii iaitu dengan memasukan zakar kamu dalam mulut seorang perempuan bernama Nur Izzah Hazirah KPT: 990110-01-6800 dengan niat untuk mencabul kehormatannya dan oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 377B Kanun Keseksaan.

[2] The sessions court, at the conclusion of the case for the prosecution, ruled that the prosecution had failed to make out a prima facie case against the appellant and acquitted and discharged him.

[3] The prosecution filed an appeal against the said decision to the High Court. The High Court upheld the decision of the sessions court in acquitting and discharging the appellant on the grounds that the prosecution had failed to make out a prima facie case against the appellant.

[4] The prosecution being still aggrieved by the decision to acquit and discharge the appellant, filed a further appeal to the Court of Appeal. The Court of Appeal allowed the appeal by the prosecution and ruled that the prosecution had successfully made out a prima facie case against the appellant and ordered the case to be remitted back to the sessions court with an order that the defence of the appellant be called.

[5] The sessions court accordingly called for the defence of the appellant and found at the end of the whole case that the appellant had failed to raise a

reasonable doubt in the prosecution case and convicted him on both charges. The appellant was sentenced to imprisonment of three years from the date of conviction for the first charge under s 354 of the Penal Code and seven years from date of conviction for the second charge under s 377B of the Penal Code. Both sentences were ordered to run concurrently. The appellant was not made subject to whipping as he was almost 60 years of age.

[6] The appellant appealed to this court in respect of both the conviction and sentence passed on both charges against him.

SALIENT FACTS

[7] The salient facts led by the prosecution disclosed that on 1 July 2013 between the hours of 10am–11am while at the classroom at Sekolah Menengah Kebangsaan Dato' Usman, Kota Tinggi, SP1, the victim, was told by the appellant that he would wait for her at the school toilet at the far end.

[8] When SP1 arrived there, the appellant asked SP1 to enter the toilet. The appellant then lifted SP1's dress, groped and fondled her breasts. The appellant then opened his trousers and inserted his penis into SP1's vagina. The appellant also asked SP1 to perform oral sex on him until he ejaculated his semen on the floor. While this act of oral sex was being performed, SP1 was seated on the toilet seat while the appellant was standing.

[9] This incident lasted about ten minutes. SP1 said that she was unable to escape or to shout for help as she was prevented from doing so by the appellant. SP1 said that she had been violated by the appellant for the last one and a half years previously, the last of the incidents being on 1 July 2013 as per the charges in this case. SP1 said that she and the appellant would usually communicate through short messaging service ('SMS') during and after school hours. The appellant had informed SP1 not to tell anyone and to erase all SMS's that she received from him.

[10] SP1 would usually delete the SMS's received from the appellant but on this occasion had forgotten to delete one of the messages. As a result, these SMS's were read by SP1's younger brother who showed the messages to their mother on 3 July 2013. Part of the message was the abbreviated word 'hsp'.

[11] When confronted by her mother was to what this meant, SP1 replied that it meant 'hisap'. SP2, the father of SP1 also read the message. SP2 remembered having read the text, 'Jangan rapat sangat dengan saya, ada yang perasan' and 'Esok sayang hisap sampai habis'. SP2 asked SP1 about the meaning of the said text but did not get a reply from SP1.

[12] On 4 July 2013, SP2 went to SP1's school and met SP4 who was the 'Guru Penolong Kanan Pendidikan Khas' at SMK Datuk Usman Awang, Kota Tinggi. SP2 inquired as to the number which appeared in SP1's handphone bearing the number 019-7395303 and was told by SP4 that the said hand phone number belonged to the appellant. The investigating officer later confirmed that his investigation revealed that the number 019-7395303 was registered in the name of the appellant.

[13] In the absence of SP2, SP4 asked SP1 whether the sender of the SMS was from the hand phone number of the appellant and SP1 nodded her head. SP4 also asked SP1 what the expression 'hsp' meant and SP1 replied it meant to perform fellatio or oral sex on the appellant.

[14] On 5 July 2013, SP2 lodged a police report ('P6') against the appellant in respect of what the appellant had done to SP1. Following this, SP1 was sent for a medical check-up at Hospital Sultan Ismail, Johor Bahru, and the medical report tendered as exh P23.

[15] The said medical report ('P23') stated that there was an old hymen tear on the hymen of SP1 at the 3, 6 and 9 o'clock positions.

[16] SP4 under cross-examination, agreed to the suggestion that SP1 was a problem student. SP4 also said that pupils were not allowed to leave the classroom without permission and if such an incident as that as alleged had occurred, it would have been noticed by someone as the door to the toilet was open. SP4 also agreed to the suggestion by learned counsel of the appellant that the allegation by SP1 may have been a mere figment of imagination by SP1.

[17] After defence was directed to be called by the Court of Appeal, the sessions court duly ordered for the appellant to make his defence. After the options were explained, the appellant elected to make a statement from the dock. The appellant also called other witnesses in his defence who gave sworn testimony.

[18] The appellant in his unsworn statement in summary stated that on 1 July 2013 between 10.10am and 10.40am he was acting as the relief teacher 'Guru Relief' in a 'Kelas Iman' or moral class where SP1 was in attendance along with other pupils.

[19] According to the appellant, during that period of time, he did not leave the class. He also said that SP1 also did not leave the class for that duration and should SP1 have wanted to leave the class, she would have to be accompanied by the 'Penolong Pengurusan Murid' or the teacher in charge of student affairs.

[20] The appellant stated that SP1 was prone to making up stories and that she had made up this story against him. He denied the allegation. He said that he was the victim of a frame up.

[21] In support of his evidence, the appellant called SD3 and SD4 as witnesses. SD4 taught the moral class or 'Kelas Iman' from 9.40am, until 10.10am, while SD3 taught the same class from 10.40am, until 11.40am Both these witnesses testified that they had seen the appellant in his moral class or 'Kelas Iman' between 10.10am until 10.40am that day.

[22] After hearing the defence, the learned sessions court judge found that the defence had failed to raise a reasonable doubt in the case for the prosecution and convicted him on both charges.

ISSUES RAISED BY THE APPELLANT

[23] In summary, the appellant submitted that the learned sessions court judge ('the SCJ') had failed to evaluate and consider that the evidence of the alleged victim, SP1, was untrue, inconsistent and unsupported by independent corroboration.

[24] The appellant further submitted that the SCJ had confirmed at the close of the prosecution case that the evidence of SP2 and SP3, the father and mother respectively of SP1, was not independent and could not be considered as corroboration as they emanated from the same source, namely, the victim, SP1.

[25] It was contended that the SCJ had misdirected herself when she stated in her grounds of judgement that no alibi notice was given whereas SP7 had confirmed that he had recorded statements from alibi witnesses.

[26] The appellant also submitted that the SCJ had erred in law and fact when she alluded to the fact that the learned High Court judge had found that a prima facie case had been made out whereas in fact, the learned High Court judge had found that there was no prima facie case.

The appellant submitted that the SCJ had erred when she held that the issue of the appellant's impotency 'mati pucuk' was an afterthought when in fact it was agreed by SP7 that he had performed a potency test on the appellant.

[27] It was also contended that the SCJ had failed to consider the fact that SP1 was a problem pupil and that her version may have been an invention. It was submitted in conclusion that the evidence against the appellant was weak, the evidence of SP1 was not credible and there was no independent corroboration.

PRINCIPLES REGARDING APPELLATE INTERFERENCE

[28] The duty upon a court hearing an appeal from a subordinate court is set out in s 316 of the Criminal Procedure Code and reads:

> 316 Decision on appeal
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> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence —
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (iii) in an appeal from any other order, alter or reverse such order.

[29] In the case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA, (as His Lordship then was) had this to say:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ Malaya) said (at pp 39–40):
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> > ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor AIR* 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *Rex v Low Toh Cheng* [1941] 1 MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
> >
> > With respect, what Lord Russell of Killowen said in Sheo Swarup was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *'the High Court should and will always give proper weight and consideration to such matters' as:*
> >
> > (1) *the views of the trial judge on the credibility of the witnesses;*

(2) *the presumption of innocence in favour of the accused;*

(3) *the right of the accused to the benefit of any doubt; and*

(4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses*.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 where he at p 375 quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582 that:

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

[30] The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, where the Court of Appeal held:

> *When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong* (see *China Airline Ltd v Maltran AirCorp Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt A Kadir v China Airline Ltd v Maltran AirCorp Sdn Bhd & Anor Appeal* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1).
>
> *The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:*
>
> (a) *by reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or*
>
> (b) *in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or*
>
> (c) *it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or*
>
> (d) *in so far aside the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer*. (Emphasis added.)

ANALYSIS AND DECISION

[31] As alluded to earlier, this was a case which was remitted back to the sessions court after a finding was made, upon perusing the evidence for the prosecution, that they had succeeded in making out a prima facie case against the appellant. This was contrary to the decision of the SCJ and the learned High Court judge who heard the prosecution's appeal.

[32] It is therefore to be taken that the prosecution had successfully proven the ingredients of the charges against the appellant. The SCJ, after hearing the case for the defence, held that the appellant had failed to raise a reasonable doubt and convicted him on both charges.

[33] It now falls upon this court to examine whether the learned SCJ had erred in law or fact in coming to the findings and decision that she did. This court in doing so was guided by the principles enunciated in the case law in respect of appellate interference as referred to above.

[34] Learned counsel for the appellant submitted, inter alia, that the evidence of SP1, the victim, was not corroborated by the testimony of SP2 and SP3, the father and mother of SP1 respectively, as they emanated from the same source and was therefore not independent. The appellant also submitted that the learned SCJ had recognised this at the close of the case for the prosecution. Learned counsel for the appellant also raised other alleged infirmities in the prosecution case.

[35] As alluded to earlier, the Court of Appeal had ruled, contrary to the decision of the SCJ, that there was a prima facie case against the appellant, when it remitted the case back to the sessions court with an order that the defence of the appellant be called. In that context, the earlier ruling of the SCJ in respect of the fact that there was no independent corroboration was irrelevant. The same would also go for the other initial findings made by the SCJ at the end of the prosecution case.

[36] There were no grounds made available in respect of the Court of Appeal decision that the prosecution had successfully made out a prima facie case and ruled that the defence be called. However, it is evident that the Court of Appeal must have been satisfied on the available evidence that the prosecution had proven all the necessary ingredients of the charges against the appellant.

Can this court revisit the case for the prosecution?

[37] The issue arises presently as to whether this court can now re-evaluate the evidence for the prosecution notwithstanding that the Court of Appeal had

ruled that there was a prima facie case made out? If the answer to the question is in the negative, this court may only then consider whether the SCJ was correct in finding that the defence case had failed to raise a reasonable doubt in the prosecution case. Put another way, this court can then only consider the case for the defence.

[38] The criminal appellate jurisdiction of the superior courts is contained in the following sections of the Courts of Judicature Act 1964.

[39] The criminal appellate jurisdiction of the High Court is as follows:

> 26 Appellate criminal jurisdiction
>
> The appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts according to any law for the time being in force within the territorial jurisdiction of the High Court.

[40] The criminal appellate jurisdiction of the Court of Appeal is as follows:

> Appellate Jurisdiction — Criminal Appeals
>
> 50 Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
>
> (a) in the exercise of its original jurisdiction; and
>
> in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.
>
> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.
>
> (4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[41] The criminal appellate jurisdiction of the Federal Court is as follows:

87 Jurisdiction to hear and determine criminal appeals

(1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.

(2) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any officer authorized by the Public Prosecutor.

(3) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[42] It is clear from the above that the hierarchy or structure of the system of courts in our jurisdiction was essentially premised upon a two tier right of appeal. Cases from the magistrates courts may thus be appealed to the High Court and thereafter on a point of law, with leave, to the Court of Appeal.

[43] Cases from the sessions court may be appealed to the High court and thereafter to the Court of Appeal while cases tried by the High Court in their original jurisdiction, may be appealed to the Court of Appeal and to the Federal Court.

[44] The decision of the SCJ that the prosecution had failed to make out a prima facie case for the prosecution was subject to appeal to the High Court who upheld the decision of the SCJ. The matter thereafter went on further appeal to the Court of Appeal. However, the Court of Appeal to the contrary decided that the prosecution had succeeded in making out a prima facie case and ordered that the defence of the appellant be called. That effectively concluded the two tier process in respect of the decision in respect of whether a prima facie case had been made out by the prosecution.

[45] To now allow the appellant to revisit the issue of whether a prima facie case had been made out would tantamount to according to the appellant 'three bites at the cherry', to quote an analogous proverb. The policy against this by virtue of the two tier hierarchy system and also the principle of stare decisis would militate against this.

[46] I therefore hold that this court is bound by the decision and finding of the Court of Appeal that a prima facie case was made out by the prosecution. It cannot revisit the case for the prosecution. This court is therefore only confined to considering whether the defence case has succeeded in raising a reasonable doubt in the case for the prosecution.

Had the learned sessions court judge erred in law or fact in her assessment of the defence?

[47] The learned SCJ after hearing and assessing the defence and in keeping with established principles as to assessment of evidence at the end of the whole case, had re-evaluated all the evidence and exhibits in coming to her finding that the prosecution had succeeded in proving a case against the appellant beyond a reasonable doubt. This was clearly reflected in the learned SCJ's grounds of judgment.

[48] The learned SCJ had further considered the effect of the appellant's sworn statement from the dock. She had placed reliance upon the case of *Masroni bin Ahmad Rafi v Public Prosecutor* [1996] MLJU 584; [1996] 1 LNS 341 which held:

> The appellant gave a statement from the dock. The right of an accused ... to make an unsworn statement from the dock is not a procedural right but a substantive right: *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104 at p 105 per Wee Chong Jin CJ; see also *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39. *An accused who makes a statement from the dock should not be questioned by the trial judge except for the purpose of clearing up ambiguities* (*Suhaime bin Haji Serat v Reg* [1956] 1 MLJ 252). *However, the weight to be given to a statement from the dock, since such a statement is not sworn evidence and would not have been tested by cross-examination, must be less than it being evidence from the witness box* (see *Mohamed Salleh v PP* [1969] 1 MLJ 104 at p 105). *'... it is not entitled to the same weight as sworn testimony': PP v Karim bin Othman* [1994] 2 CLJ 826 at p 836 per Lamin J (as he then was); see also *Shimmin*'s Case 15 Cox CC 122 at p 124. As to the particular evidential value to be given to an unsworn statement from the dock, much depends on the particular circumstances of each case: *Director of Public Prosecutions v Walker* [1974] 1 WLR per Lord Salmon. And in *PP v Lee Ah Ha* [1989] 1 MLJ 120, where the prosecution had made out a case, Abdul Malek J (as he then was) held that a mere denial through a statement from the dock had not raised any doubt on the prosecution case. (Emphasis added.)

[49] The learned SCJ had therefore correctly observed that the weight to be accorded to an unsworn statement made from the dock must necessarily be entitled to less weight than that of evidence by way of sworn testimony.

[50] She had further correctly observed that the evidential value of such evidence would be affected by the absence of the opportunity to test the credibility of such evidence by way of cross-examination. She was therefore correct also in observing that the appellant had failed to give credible evidence.

[51] Although SD3 and SD4 had respectively testified that they had taught a class each after and before the class taught by the appellant, and each of them had witnessed the appellant in the classroom that day, they could not be certain

that both the appellant and SP1 were in fact present in the class during the whole time. The learned SCJ had correctly considered this part of the evidence as reflected in her judgement when she observed that these witnesses could not support the appellant's alibi.

[52] The submission of learned counsel for the appellant that the learned SCJ had erred when in her grounds of judgement she stated that no alibi notice was given was unfounded. Notwithstanding such reference by the learned SCJ, she had in her grounds of judgement alluded to the testimonies of the defence witnesses that did not support the appellant's alibi. The learned SCJ was therefore cognisant of and well aware of the fact that the appellant's defence was premised upon an alibi.

[53] The appellant had not denied sending the SMS to SP1. He however said that it was only meant to be a joke. The appellant's contention that the family of the victim was unhappy with him and conspired against him merely based upon his SMS was not reasonable. SP1's and SP2's evidence that the appellant had committed the acts complained of were therefore credible and demolished the claim of the appellant that they had conspired against him.

[54] The learned SCJ had correctly also found that the defence of him being impotent or 'mati pucuk', was unsupported by any credible evidence sufficient to raise a reasonable doubt in the prosecution case. While the court may not draw any adverse inference against defence for the non calling of a witness, a court may take into account failure to call a witness by the defence. See *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355, which held as follows:

> *I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness* or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew v Public Prosecutor* [1949] 1 MLJ 150. *However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence* (*Regina v Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v Lim Kuan Hock* [1967] 2 MLJ 114 at p 115; *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95 at p 100). (Emphasis added.)

[55] The learned SCJ's erroneous reference to the fact that the learned High Court judge had found that the prosecution had made out a prima facie case against the appellant did not prejudice the appellant's case. As earlier considered, this court was not at liberty to revisit the decision of the Court of Appeal in respect of whether the prosecution had successfully made out a prima

facie case against the appellant. That being the case, the remark made by the learned SCJ held no present consequence and therefore did not prejudice the appellant in any manner.

[56] The incorrect description of the defence of the appellant that he was impotent, as an afterthought, did not prejudice the case for the prosecution as there was sufficient evidence that the appellant had committed the offence. In any event, even if the appellant was impotent, this did not necessarily mean that he did not commit the offences for which he was charged with. There was sufficient other evidence that the appellant had committed the offences he was charged for.

[57] On a consideration of the evidence as a whole, I do not find that the learned SCJ had erred in fact or in law in coming to her ultimate decision at the end of the whole case. The appeal against conviction is therefore dismissed.

Sentence

[58] In respect of sentence, upon a perusal of the grounds of judgment of the learned session court judge, she had considered all relevant factors. She had considered that the public interest was the first and foremost consideration and that not only must the sentence passed act as a lesson to the offender but also act as a deterrent to others in wanting to commit such offences.

[59] The learned SCJ had further correctly recognised the vulnerability of the victim who was a child with special needs and that the appellant had abused the trust and confidence reposed in him to care for the victim as custodian and not to take advantage of the situation. The learned SCJ had also alluded to the fact that the appellant had tainted the good name of the teaching profession by committing such an act. She had therefore taken into account all relevant considerations.

[60] Under the circumstances, I found no flaw in the sentences passed by the learned SCJ and accordingly dismissed the appeal against sentence while affirming the sentences passed by the SCJ.

Appeal against conviction and sentence dismissed.

Reported by Kohila Nesan